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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

BENJAMIN CABALO et al.,

Plaintiffs and Appellants,

v.

ONEWEST BANK, FSB, et al.,

Defendants and Respondents.

E060247

(Super.Ct.No. CIVRS1000752)

OPINION

APPEAL from the Superior Court of San Bernardino County. Janet M. Frangie,  
Judge. Affirmed.

Thomas W. Gillen for Plaintiffs and Appellants.

Wright Finlay & Zak, Jonathan D. Fink and Magdalena D. Kozinska for  
Defendants and Respondents.

## INTRODUCTION

Plaintiffs Benjamin and Rosalinda Cabalo appeal from a judgment of dismissal in favor of defendants OneWest Bank, FSB (OneWest) and Deutsche Bank National Trust Company, “as Trustee of the Indymac INDX Mortgage Loan Trust 2004-AR6, Mortgage Pass-through Certificates, Series 2004-AR6 Under Pooling and Servicing Agreement Dated August 1, 2004” (Deutsche Bank) following the trial court’s sustaining of defendants’ demurrer without leave to amend as to plaintiffs’ second amended complaint on the ground the statutes of limitations had run.

Plaintiffs contend (1) a fiduciary relationship excused them from the statute of limitations for the period from June 2004 through spring 2009; (2) the period involved in loan negotiations (2009-2012) excused them from the statute of limitations under the doctrine of equitable estoppel; and (3) the trial court abused its discretion by sustaining the demurrer without leave to amend. We find no error, and we affirm.

## FACTS AND PROCEDURAL BACKGROUND

We set forth the facts consistent with the standard of review that governs a judgment of dismissal following the sustaining of a demurrer. We accept as true all facts properly pleaded in the complaint and matters as to which judicial notice may properly be taken. (*Pierce v. San Mateo County Sheriff’s Dept.* (2014) 232 Cal.App.4th 995, 1002.) “We construe the complaint’s alleged facts liberally and give the complaint a reasonable interpretation, reading the complaint as a whole and reading its parts in their context. [Citations.]” (*Ibid.*)

On January 27, 2010, plaintiffs filed their original complaint against Integrity Bancorp (Integrity), New Century Title, Indymac Mortgage Services, and Mortgage Electronic Registration Systems, Inc. (MERS). Neither OneWest nor Deutsche Bank was named as defendants. (The complaint is not included in the record on appeal.) On April 28, 2010, the case was ordered dismissed without prejudice for failure to serve and failure to appear.

On October 14, 2010, plaintiffs were granted leave to file a first amended complaint. (The first amended complaint is not included in the record on appeal.) Again, neither OneWest nor Deutsche Bank was named as defendants. The trial court sustained the then-named defendants' demurrers to the first amended complaint and granted plaintiffs leave to amend as to causes of action for misrepresentation, unconscionability, violation of Business and Professions Code section 17200, and declaratory relief and quiet title.

Plaintiffs filed their second amended complaint on June 25, 2012, and for the first time named as defendants OneWest, as the successor in interest to all interests in the deeds of trust currently or previously held by Indymac FSB, and Deutsche Bank, as it claimed an interest in the first trust deed.<sup>1</sup> Plaintiffs state in their opening brief that "[t]hrough the Office of Thrift Supervision, the beneficial interest of the deed of trust is owned by Deutsche Bank (as trustee) and serviced by IndyMac division of OneWest Bank." The second amended complaint alleged causes of action for fraud, legal and

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<sup>1</sup> Other named defendants are not parties to this appeal.

equitable relief based on fraud and public policy, and violation of Business and Professions Code section 17200 et seq.

Plaintiffs alleged that they purchased a residence in Chino Hills in May 2004 for \$715,000, financed by an adjustable rate loan of \$567,800 (with monthly payments of \$3,016.44) and a second loan of \$70,900 (with monthly principal and interest payments of \$615.66). The lender on both loans was Integrity.

Plaintiffs further alleged that defendants' lending personnel (defined as "[t]he authorized directors, officers, agents, employees, appraisers, [and] brokers") knowingly made three misrepresentations to induce them to purchase the residence financed by the first and second loans: (1) that the appraised value of the residence was \$715,000 when the actual value of the residence was no more than \$600,000; (2) that the monthly payments on the first loan would be \$3,106.44, which would retire the loan in 30 years, when in fact the loan was subject to an adjustable rate mortgage under which the monthly payments would increase substantially; and (3) that the monthly payments on the second loan would be \$615.66, when in fact the second loan was subject to a balloon payment.

Plaintiffs also alleged that (1) defendants' lending personnel had an affirmative duty to disclose the true terms of the loans, but failed to do so; (2) they have paid more than \$175,000, with purchase money loans totaling \$638,700; and (3) defendants claim plaintiffs now owe more than \$715,000, with a possible \$70,000 balloon payment on the second priority loan.

OneWest and Deutsche Bank filed a demurrer to the second amended complaint on the grounds that plaintiffs (1) did not obtain leave of court to add new causes of action, and (2) failed to allege facts sufficient to constitute a cause of action. The trial court sustained the demurrer without leave to amend on the ground the statutes of limitations had run as to all causes of action.

## DISCUSSION

### **Statutes of Limitations**

A three-year statute of limitations applies to fraud-based causes of action. (Code Civ. Proc., § 338, subd. (d).) A four-year statute of limitations applies to an action to enforce Business and Professions Code section 17200. (Bus. & Prof. Code, § 17208.) The statutes of limitations begin to run when a plaintiff discovers the facts constituting the basis for the cause of action. (Code Civ. Proc., § 338, subd. (d); *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1196.)

“Because the discovery rule operates as an exception to the statute of limitations, ‘if an action is brought more than three years after commission of the fraud, plaintiff has the burden of pleading and proving that he did not make the discovery until within three years prior to the filing of his complaint.’ [Citation.] To excuse failure to discover the fraud within three years after its commission, a plaintiff also must plead ‘facts showing that he was not negligent in failing to make the discovery sooner and that he had no actual or presumptive knowledge of facts sufficient to put him on inquiry.’ [Citations.] To that end, a plaintiff must allege facts showing ‘the time and surrounding circumstances of the discovery and what the discovery was.’ [Citation.] Conclusory

allegations will not withstand a demurrer. [Citation.] The discovery-related facts should be pleaded in detail to allow the court to determine whether the fraud should have been discovered sooner. [Citation.]” (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1472.)

With respect to delayed discovery, plaintiffs admitted they received the loan documents at closing “which were then placed in a folder for [their] permanent records.” They alleged that in 2008, they both lost their jobs, and in December 2008, defendants recorded a notice of default. They alleged they applied for a loan modification and in May 2009 executed documents that indicated a loan modification would be provided. They alleged they did not discover the facts in their loan documents “until they were examined in the loan modification discussions.”

Plaintiffs filed their original complaint on January 27, 2010. They filed their second amended complaint, in which for the first time they named OneWest and Deutsche Bank as defendants, on June 25, 2012. “A complaint may be amended after the statute has run to correct the misdescription of a party, but not to add a new party.” (*Alliance for Protection of Auburn Community Environment v. County of Placer* (2013) 215 Cal.App.4th 25, 32.) An amended complaint adding a new party does not relate back to the original complaint. (*Woo v. Superior Court* (1999) 75 Cal.App.4th 169, 176.) Thus, even if plaintiffs did not discover the alleged fraud until they examined the documents during the loan modification process, that discovery took place no later than May 2009, by plaintiffs’ own admission, but their complaint against defendants was not

filed until June 25, 2012, after the three-year statute of limitations for fraud-based claims had run, even under the delayed discovery rule.

We also conclude the four-year statute of limitations had run as to plaintiffs' claims for violation of Business and Professions Code section 17200 et seq. Plaintiffs received copies of the loan documents, and they initialed a rider to the first deed of trust which disclosed that the loan had an adjustable interest rate. As a general rule, a person is presumed to know the contents of a written contract to which he assents, and he "cannot escape being bound by its terms merely by contending that he did not read them." (*Stewart v. Preston Pipeline, Inc.* (2005) 134 Cal.App.4th 1565, 1589.)

Plaintiffs contend that a fiduciary relationship excused the bar of the statute of limitations from June 2004 through spring 2009. They contend that a loan broker has a fiduciary relationship to a buyer, and they were entitled to rely on representations made by a loan broker.

In their second amended complaint, plaintiffs attributed all actions on which they based their causes of action to defendants' lending personnel. As noted *ante*, they defined such personnel to include "[t]he authorized directors, officers, agents, employees, appraisers, [and] brokers." They did not allege that any of the lending personnel acted as their own loan broker, nor did they mention their own loan broker in the complaint. In short, they did not allege any facts sufficient to establish that anyone acted as a dual agent. (See, e.g., *Nguyen v. Scott* (1988) 206 Cal.App.3d 725, 733 [mere allegation of dual agency is a legal conclusion that may be disregarded in considering the sufficiency of a demurrer].) While plaintiffs alleged that defendants had a duty to disclose the details

of the loans, they did not allege that such duty arose from any fiduciary relationship. We conclude the trial court did not err in determining that the statutes of limitations had run as to plaintiffs' causes of action.

### **Equitable Tolling**

On appeal, plaintiffs further contend that the statute of limitations were equitably tolled from 2009 through 2012 because "the loan servicer immediately entered into loan modifications with Plaintiffs, and, at the same time, did not pursue the right to conduct the foreclosure . . . ."

Conduct of a prospective defendant that induces delay on the part of a prospective plaintiff may create an equitable estoppel that prevents the defendant's reliance on the statute of limitations. (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 936; *John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 444, fn. 4.) "The equitable tolling of statutes of limitations is a judicially created, nonstatutory doctrine. [Citations.] It is "designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied." [Citation.] Where applicable, the doctrine will "suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness." [Citations.]'" (*Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 746.) For the doctrine of equitable tolling to apply, the plaintiff must establish "three elements: "timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff." [Citations.]" [Citation.] "The timely notice requirement essentially means that the first claim must have been



filed within the statutory period. Furthermore[,] the filing of the first claim must alert the defendant in the second claim of the need to begin investigating the facts which form the basis of the second claim. Generally this means that the defendant in the first claim is the same one being sued in the second.’ [Citation.] ‘The second prerequisite essentially translates to a requirement that the facts of the two claims be identical or at least so similar that the defendant’s investigation of the first claim will put him in a position to fairly defend the second.’ [Citation.] ‘The third prerequisite of good faith and reasonable conduct on the part of the plaintiff is less clearly defined in the cases. But in *Addison v. State of California* [(1978)] 21 Cal.3d 313[,] the Supreme Court did stress that the plaintiff filed his second claim a short time after tolling ended.’ [Citations.]””” (*Hopkins v. Kedzierski*, at p. 747.)

Plaintiffs have failed to show that discussions of loan modification stopped the running of the statutes of limitations. First, the statutory time period for the fraud-based claims expired in June 2007 and the statutory period for the unfair business practices claims expired a year later. As we have concluded *ante*, the discovery rule did not extend those statutes. Thus, plaintiffs have failed to establish the first prerequisite for the doctrine of equitable estoppel. Moreover, they have not represented that any of the issues raised in the current lawsuit were raised, discussed, or investigated during the loan modification process. Thus, they also did not satisfy the second prerequisite for that doctrine.

DISPOSITION

The judgment of dismissal is affirmed. Costs are awarded to respondents.

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McKINSTER  
J.

We concur:

RAMIREZ  
P. J.

HOLLENHORST  
J.